IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

NOTICE OF MOTION NO.3731 OF 2007
IN
SUIT NO.2722 OF 2007

1. Larsen & Toubro Limited, an existing public limited company incorporated under the provisions of the Companies' Act, 1956 and having its registered office at L&T House, Ballard Estate, Mumbai-400 001.

2. L&T Employees Welfare Foundation, a Trust, established under the Indian Trust Act, 1882, having its office at L&T House, Ballard Estate, Mumbai-400 001.

3. S.V. Subramanian, Indian Inhabitant, residing at Flat No.7, Dwarka, Cheda Nagar, Chembur, Mumbai-400 089.

4. Sadhana P. Dhamane, Indian Inhabitant, residing at 8/81, Jeevan Akash, Forjett Hills, Mumbai-400 036.

5. A. G. Karkhanis, Indian Inhabitant, residing at 1, Orion Apartments, 29/A, Lallubhai Park Road, Andheri (W), Mumbai-400 058.

6. S. C. Dikshit,
   Indian Inhabitant, residing at
   Flat No.1802, 18th Floor,
   Panorama Tower, Prathmesh Complex,
   Veera Desai Road, Amboli Hills,
   Andheri (W), Mumbai-400 053.

7. P. M. Mehta,
   Indian Inhabitant, residing at 501,
   Juhu Green, Plot No.20, Suvarna
   Nagar Society, North South Road No.4,
   JVPD Scheme, Mumbai-400 049.

8. V.J. Shukla,
   Indian Inhabitant, residing at 501,
   Palm Beach Co-op. C. H. S.
   Gandhigram Road, Juhu,
   Vile Parle (W), Mumbai-400 049. ...Plaintiffs.

Vs.

1. Grasim Industries Limited,
   a public limited company
   incorporated and registered under
   the Companies' Act, 1956 and having
   its registered office at Birlagram,
   Nagda, Madhya Pradesh and
   corporate office at Aditya Birla
   Centre, s.K. Ahire Marg, Worli,
   Mumbai-400 030.

2. Samruddhi Swastik Trading Investments
   Limited, a public limited company
   incorporated and registered under
   the Companies' Act, 1956 and having
   its registered office at Birlagram,
   Nagda, Madhya Pradesh and Corporate
   office at Aditya Birla Centre, A2,
   S.K. Ahire Marg, Worli, Mumbai-400 030. ....Defendants.

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Dr. Virendra V. Tulzapurkar, Senior Advocate with Mr. N. H.Seervai, Senior Advocate with Mr. S.V. Doijode, Mr. P.A. Kabadi and Ms. Meenakshi Iyer i/b. Doijode Associates for the Plaintiffs.
Mr.I. M. Chagla, Senior Advocate with Mr. Prashant Beri i/b. M/s. Beri & Co. for Defendant No.1.
Mr.Janak Dwarkadas, Senior Advocate with Mr. Riyaz Chagla and Mr. Prashant Beri i/b. M/s. Beri & Co. for Defendant No.2.

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CORAM :DR.D.Y.CHANDRACHUD, J.
December 14, 2007.

JUDGMENT:

The dispute in the suit and in the Notice of Motion relates to a shareholding of 19,25,992 shares of the Defendants in the First Plaintiff. The Plaintiffs seek specific performance of an agreement by which the Defendants agreed, according to the Plaintiffs, to sell their shareholding of 9,62,996 shares in the First Plaintiff which, together with the accretion of bonus shares totals up to 19,25,992 shares. The Plaintiffs claim that there was an agreement by which these shares were to be sold to the Second Plaintiff at and for a consideration of Rs.240/- per share. There is a claim for damages in the amount of Rs. 461.41 crores in the event that the Court comes to the conclusion that specific performance cannot be granted. The interlocutory relief which is sought in the Motion is for the appointment

of a Receiver and for an injunction restraining the Defendants from alienating the shares and exercising any rights in respect of the shares including voting rights or from receiving dividends. A mandatory injunction is sought requiring the Defendants to subscribe to shares, debentures or securities that may be offered by the Plaintiffs in respect of the holding of the shares in dispute. By consent, the Motion has been taken up for final disposal.

2. The First Plaintiff (“L and T”) is a Company incorporated under the Companies' Act, 1956, while the Second Plaintiff is a Trust founded for the benefit of the employees of the Company. Plaintiff Nos.3 to 8 are trustees of the Trust. Both the Defendants are Companies incorporated under the Companies' Act, 1956, the Second Defendant being a wholly owned subsidiary of the first. The Defendants held at the material time, 15.73% of the then existing paid up capital of the First Plaintiff and had two representatives on the Board of Directors. In or about 2003, the First Defendant “Grasim”) held 14.86% while the Second Defendant held 0.87% of the shareholding of L and T. On 15th June 2003, a proposal was

submitted by the First Defendant (Grasim) to the First Plaintiff (L&T) for restructuring of the cement business of L&T. The objective of the proposal was that there was to be a demerger of the Cement Division of L&T to a Special Purpose Company (CemCo) and a consequent issue of shares of CemCo to the shareholders of L&T in terms of a Scheme of Arrangement under Sections 391 to 394 of the Companies' Act, 1956. Grasim was to acquire 8.5% of the shareholding of CemCo at a price mutually agreed, from L&T. Concurrently with this, Grasim was to sell its entire holding in L&T at a mutually agreed price to a Trust or foundation named by L&T. The proposal stipulated that upon the approval of the respective Boards of Directors, a binding restructuring agreement would be entered into between the parties. The restructuring agreement was to set up the frame work of the entire transaction. The proposal envisaged that the following documents would be executed in relation to the transaction, namely (i) A Scheme of Arrangement; (ii) A Share sale and purchase agreement; and (iii) A Deed of Covenant. The proposal envisaged that on the one hand L&T would sell certain shares in CemCo to Grasim and concurrently Grasim would sell its entire shareholding

together with its associates in L&T to a Trust nominated by L&T. Thereupon, L&T would not purchase further shares of CemCo for a prescribed period while on its part, Grasim would not purchase any shares of L&T for a specified period.

3. On 17th June 2003 Grasim, acting in pursuance of its earlier proposal, offered to L&T to buy the shares of CemCo for acquiring management control, at Rs. 171.30 per share, while on its part, Grasim agreed to sell its entire holding in L&T, at Rs.120/- per share. The price of Rs.120/- per share was based on an assumed equity share capital of Rs. 248.67 crores and it was recognised that the actual number of shares may vary consequent upon which the price offered would have to be changed proportionately.

4. A meeting took place on 17th June 2003 of the Board of Directors of L&T, during the course of which, the Board decided to accept in principle, the 'revised integrated proposal' dated 15th June 2003, received from Grasim to demerge the cement business of the Company. The resolution of the Board noted that the integrated

proposal would involve inter alia, the sale by Grasim of its entire shareholding in L&T to a Foundation/Trust founded for the welfare of the employees of the Company at Rs.120/- per share. L&T on its part would sell to Grasim, 8.5% of its shareholding in the cement company at Rs. 171.30 per share. On 14th July 2003, L&T in a communication to Grasim communicated its in principle acceptance of the proposal subject inter alia to the condition that the shares to be sold by Grasim to an L&T Foundation/Trust would be cum-dividend/cum-bonus. Grasim responded to the condition on 4th August 2003.

5. At this time, it was in the contemplation of the parties that the sale by Grasim to the L&T Foundation of its entire stake of 15.73%, would need an exemption of the Securities and Exchange Board of India (SEBI) from the application of the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. On 11th August 2007, a communication was addressed to the Chairman and Managing Director of L&T, containing a copy of a letter addressed to him, by Shri D.D. Rathi, whole time Director and Chief

Financial Officer on behalf of Grasim and it was stated that the original of the letter was being kept in the safe custody of S.Gurumurthy. The letter recorded that the L&T Foundation, which was to acquire the shareholding of Grasim was planning to approach SEBI for an exemption from the requirement of making an open offer despite its purchasing a stake in excess to 15%. The letter envisaged that if L&T Foundation was successful in obtaining an exemption from SEBI, the foundation would proceed to buy the entire quantum of 15.73% from Grasim. However, in the meantime, in order to proceed with the transaction, it was agreed that Grasim would sell and the Foundation would purchase a stake just under 15%. In the event the Foundation was not successful to obtain an exemption from SEBI, Grasim was to offer to sell the balance of the stake at the same price through such parties identified by L&T, who would be deemed not to be acting in concert with the Foundation. The letter stated that Grasim understood that it would not sell the balance of its stake (0.78%) for one year. The letter stated that it had a concurrence of “Mr.Birla”.

6. On 9th September 2003, the Second Plaintiff submitted an application to SEBI seeking exemption for acquiring more than 15% of the shares of L&T and from the requirement of making an open offer. The application contemplated that the offer price per share was Rs.120/- and that Grasim together with the Second Defendant owned 15.73% of the equity capital.

7. A meeting of the Board of Directors of L&T took place on 24th September 2003. The meeting was attended, inter alia, by Shri Kumar Mangalam Birla. Shri Birla, who is the Chairman of the Aditya Birla group, was a member of the Board of Directors of L&T. A presentation was made to the Board of Directors of the essential features of the transaction. The presentation stated that the integrated proposal for demerger of the cement business of L&T envisaged that Grasim will exit from L&T, concurrently with the acquisition of management control of CemCo, by selling 14.95% of its stake in L&T to the L&T employees' welfare foundation, while the balance would be sold in the open market. The entire transaction was proposed to be executed through a composite and integrated scheme

of arrangement under Sections 391 to 394 of the Companies' Act, 1956. The transaction documents contemplated were: (i) A Restructuring Agreement; (ii) A Scheme of Arrangement; and (iii) A Deed of Covenant.

8. On 21st October 2003, SEBI informed the Second Plaintiff that from its application for exemption from the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, it was observed that Grasim had offered to exit from the Engineering business of L&T by selling its entire 15.73% holding to an employees' welfare foundation, formed for the benefit of L&T employees. SEBI advised that the Foundation may, if it so desired, approach SEBI by making an application under Regulation 3(1) read with Regulation 4 after the demerger, when the matter would be examined in detail by SEBI.

9. Consequent upon these developments, a restructuring agreement was arrived at between L&T and Grasim on 3rd November 2003. The recitals to the agreement spell out that the shareholding

pattern of L&T include a holding of 15.73% between Grasim and the Second Defendant. The expression L&T shares was defined in the restructuring agreement as follows:

> ""L & T Shares" means such number of fully paid equity shares representing 14.95% of the paid up equity capital of L&T, held by Grasim and Samruddhi after the Demerger and the capital reorganisation in terms of the Scheme of Arrangement."

The expression "sale price" was defined to mean the price of Rs.240/- per share at which each of the "L&T shares" shall be sold to the Trust by Grasim and the Second Defendant under the Scheme of Arrangement. The objectives of the restructuring agreement were defined as follows:

> "(a) Objectives
>
> Each Party hereby agrees and confirms that the principal objectives of the restructuring are the Acquisition of Management Control and, concurrent therewith, the exit of Grasim and Samruddhi from L&T. In furtherance of the same, L&T and Grasim have agreed to take various steps towards the Demerger, and upon the effectiveness of the Scheme of Arrangement, the Open Offer, and concurrently, the purchase of CemCo Shares by Grasim, the Acquisition of Management Control, and the sale by Grasim and Samruddhi and purchase by the Trust of the L&T Shares so as to exit from the Remaining Business, and to effect such other transactions referred to in this Agreement, in

accordance with the terms of the Scheme of Arrangement (the “Restructuring”).”

10. A Scheme of Arrangement was presented to the Company Judge under Sections 391 to 394 of the Companies' Act, 1956. The Scheme was sanctioned by a judgment of the Learned Company Judge on 22nd April 2004. On 7th May 2004, a Deed of Covenant was entered into between L&T and Grasim, recording that the restructuring agreement inter alia contemplated the sale by Grasim and the Second Defendant of the L&T shares (defined to mean 14.95% of the paid up equity capital of L&T held by Grasim and the Second Defendant) so as to exit from the remaining business. Clause 12.4 stipulated that the Deed contained the entire agreement of the parties thereto with respect to the transaction envisaged in the Deed cancelling or superseding all other proposals, negotiations, prior discussions, understandings and preliminary agreements.

11. The effective date under the Scheme of Arrangement was 13th May 2004. On 6th July 2004, Grasim transferred 14.95% of its shareholding in L&T to the Second Plaintiff at a price of Rs.240/- per

share. It may be noted that the price which had originally been fixed at Rs.120/- per share, was increased proportionately to Rs.240/- per share. This was as a result of the capital restructuring of the First Plaintiff upon which there was a reclassification of 24.86 crores shares each of Rs.10/- into 12.433 crores shares each of Rs.2/-. The shareholding of the Defendants became 1,85,98,068 shares of Rs.2/- each. The Defendants effectuated a transfer on 6th July 2004 of a shareholding representing 14.95% of the equity to the Second Plaintiff.

12. On 12th July 2004, an application was made by the Second Plaintiff to SEBI seeking exemption from making an open offer for acquiring more than 15% of the shares of L&T under Regulation 10. The application disclosed that the Second Plaintiff held 14.95% of the total paid up capital of the target Company and referred to the earlier application to SEBI as well as SEBI's response dated 24th October 2003. The application adverted to the Scheme of Arrangement sanctioned by this Court in pursuance of which 1.85 crore equity shares constituting 14.95% of the share capital were sold to the

Second Plaintiff. The offer, the application stated, was being considered for acceptance of the balance of 9,62,996 equity shares constituting 0.77% of the share capital of L&T. There was a disclosure of the fact that upon the acquisition of the 0.77% shareholding, the total holding of the Second Plaintiff in L&T would be 15.72%. On this application, SEBI passed an order on 25th August 2004 granting exemption to the Second Plaintiff from making an open offer in terms of Regulation 10 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. The order passed by SEBI inter alia recorded thus:

> "..... the acquirer is established for promoting the welfare activities for the benefit of the employees of the target company. I have also noted that the acquirer does not intend to trade in the shares of the target company in the open market or for any commercial purpose and further there is no intention on the part of the acquirer to acquire the control or the management of the target company. I have further noted that the acquirer does not intend to nominate / sponsor any person for the directorship of the target company. Overall, I observed that the present acquisition by the acquirer is mainly for protecting the welfare of the employees of the target company and at the same time to preserve the professional management model of the target company."

13. The order passed by SEBI was communicated to Grasim's Chairman on 28th August 2004.

14. On 20th September 2004, a Division Bench of this Court upheld the judgment of the Learned Single Judge sanctioning the Scheme of Arrangement. On 23rd October 2004, a communication was addressed on behalf of the Plaintiffs by Shri N.Sivaraman, Executive Vice President to Shri D.D. Rathi, a whole time Director and Chief Financial Officer of Grasim recording that the approval of SEBI has been received for the acquisition of the balance stake on 27th August 2004. The communication recorded the assurance made on behalf of Grasim for the completion of the transaction and sought a time frame for completion. On 26th October 2004, a reply was forwarded on behalf of Grasim recording that L&T had never communicated with Grasim before applying to SEBI and it was L&T's unilateral decision in regard to the name of the seller, the approval for process etc. Grasim's Legal Advisers were stated to be examining the matter in view of the complexity of the issue under applicable legislation. On 27th October 2004, Shri Sivaraman addressed a

communication to Shri Rathi of Grasim. On 27th October 2004, the Chairman and Managing Director of L&T addressed a communication to Shri Kumar Mangalam Birla, recording that the sale of the balance share of L&T employees' foundation had yet not been completed. On 28th October 2004, Shri Kumar Mangalam Birla addressed a letter to the CMD of L&T recording that as regards the sale of the balance shares of the L&T employees' foundation, there was a commitment on that and that the transaction would be completed as soon as the teams of the respective parties had resolved certain issues.

15. According to the Plaintiffs, a meeting took place thereafter on 18th November 2004 at which Grasim is stated to have reiterated its commitment to sell its remaining holding in L&T at Rs.240/- per share. Grasim on its part was alleged to be apprehensive of the levy of capital gains tax between the rate of Rs.240/- per share which according to the Plaintiffs was the agreed rate and the then current market value of the shares which was between Rs.850/- and Rs.860/- per share. L&T on its part was not ready to furnish an indemnity to Grasim. The Minutes recorded that the issue was to be discussed

with Grasim's Advocate who was then not available. The Plaintiffs sought in the course of several communications a meeting with the Advocate for Grasim and with the CMD. A meeting was held between the officials of the parties on 14th April 2005. Eventually, the negotiations did not result in a settlement which led to the institution of the suit.

16. In support of the application for interim relief, it has been urged on behalf of the Plaintiffs that (i) The documents on the record would conclusively establish an agreement and an admission on the part of the Defendants of the conclusion of an agreement for the balance, representing 0.78% of the equity capital of L&T at a price of Rs.240/- per share and for the purchase of these shares by the Second Plaintiff from the Defendants; (ii) The Agreement for the sale of the balance representing 0.78% of the shareholding was a part of an integrated agreement for the sale of 15.73% of the stake held by the Defendants in L&T; (iii) A part of the agreement was performed by the transfer of 14.95% of the shareholding of the Defendants in L&T and thereupon Grasim obtained the benefit of the acquisition of the

cement division; (iv) The agreement contemplated a complete exit by Grasim from L&T by selling its holding to the Second Plaintiff; (v) The restructuring agreement did not represent a novatio as submitted by the Defendants but, was a part of an integrated and composite agreement under which 15.73% of the holding of the Defendants in L&T was to be sold to the Second Plaintiff.

17. On behalf of the First Defendant it has been urged that (i) There was an initial agreement between the parties to buy and sell shares, under which 15.73% of the shareholding of L&T was to be sold by the Defendants to the Second Plaintiff at Rs.120/- per share; (ii) Parties, however, envisaged that together with the sale of the Defendants' holding in L&T, Grasim would acquire 8.5% of the shareholding in the cement Company and the essence of the transaction was that this was to be done concurrently or simultaneously; (iii) In view of the SEBI Takeover Regulations, L&T Foundation would have been required to make an open offer if it were to cross the threshold of 15% while making an offer for the purchase of 15.73% equity and it was as a result of this, that there was a

change in the original agreement and the acquisition by L&T was confined to 14.95%. The balance of the shares were expressly given up; (iv) Three formal documents were executed between Public Limited Companies these being (a) The restructuring agreement; (b) The Scheme of Arrangement; and (c) The Deed of Covenant and these transactional documents reflected the entire arrangement by which the scheme for restructuring was to be carried out; (v) The Scheme of Arrangement which was presented before the Company Court under Sections 391 to 394 of the Companies' Act, 1956 was based on the restructuring agreement which constituted the entire agreement between the parties; (vi) Sanction of the scheme before the Learned Single Judge was sought on that basis; (vii) In paragraph 14 of the Plaint, a case has now been made out of a two stage agreement while in paragraph 18, an agreement is sought to be pleaded independent of the restructuring agreement; (viii) No such agreement was set up either before the shareholders or for that matter before the Company Judge when the Scheme of Arrangement was sanctioned; (ix) Without prejudice to the aforesaid submissions on merits, interim relief should, in any event, be refused since specific

performance cannot, in the final analysis, be granted having regard to the provisions of Section 10 of the Specific Relief Act, 1963; (x) The suit prima facie is barred by limitation; and (xi) The agreement between the parties was to enforce an illegal transaction which ought not to be countenanced by the Court.

18. On behalf of the Second Defendant, it has been urged that (i) All the letters of offer and acceptance spoke of the requirement of entering into a binding agreement subject to applicable laws; (ii) The pleadings of the Plaintiffs which are to the effect that the balance representing 0.78% was part of a larger transaction representing 15.73% of the equity capital would attract the application of the SEBI Takeover Regulations; and (iii) L&T has by accepting the transfer of shares from the Second Defendant to the First Defendant abandoned its case.

19. These submissions would now fall for consideration.

20. The genesis of the transaction originates in a proposal for

demerger of the cement business of L&T. Grasim together with the Second Defendant held at the material time 15.73% of the equity capital of L&T. The transaction envisaged the demerger of the cement division of L&T to a Special Purpose Company in terms of a Scheme of Arrangement under Sections 391 to 394 of the Companies' Act, 1956. It was envisaged that Grasim, on the one hand, would acquire 8.5% of the equity of the Special Purpose Company, while concurrently, it would sell its entire shareholding in L&T at a mutually agreed price to a foundation or Trust to be nominated by L&T. The proposal which was submitted by Grasim envisaged that upon the Boards of Directors of the two Companies signifying their assent, L&T, Grasim and the Cement Company would enter into a binding restructuring agreement to reflect the objectives and the understanding of the parties for the implementation of the proposal. In fact, the offer of Grasim was categorical in the following terms:

> "The Restructuring Agreement shall set out the framework of the entire transaction, the manner of implementation and the respective rights and obligations of the parties. The implementation of the transaction shall take place in terms of the Restructuring Agreement. In terms of the Restructuring Agreement, the following documents are to

> be entered into in relation to various parts of the transaction: (i) the Scheme of Arrangement; (ii) a Share Sale and Purchase Agreement to be entered into between the Trust(s) and Grasim (the "SPA"); and (iii) a Deed of Covenant to be executed by L&T in favour of Grasim and CemCo (the "Deed")." (emphasis supplied)

At this stage, to facilitate a prima facie evaluation of the merits, it would be necessary to emphasize the element of mutuality involved in the proposed transaction. Grasim was both a purchaser and a seller – it was to purchase 8.5% of the holding in CemCo while it was together with its associates to surrender its entire shareholding in L&T to a foundation to be nominated by L&T. L&T on its part was to desist from purchasing further shares in the Cement Company, while Grasim was to desist from purchasing shares of L&T for a specified period. The offer envisaged that the restructuring of the cement business was to be completed by entering into a binding restructuring agreement and the transactional documents were to consist of: (i) The Scheme of Arrangement; (ii) The Sale and Purchase Agreement; and (iii) A Deed of Covenant, which would implement the restructuring agreement. The price at which Grasim would sell its shares to L&T was to be Rs.120/- per share subject to a proportionate change consequent

upon a variation in the available base of equity shares. Grasim's proposals were contained in letters dated 15th and 17th June 2003. L&T's Board accepted in principle the revised integrated proposal submitted by Grasim on 17th June 2003 "subject to final discussions, documentation and modification" if necessary leading to the three Companies entering into a binding agreement.

21. L&T and Grasim executed three documents which formed the cornerstone of their commercial transaction. These are the Restructuring agreement, the Scheme of Arrangement and the Deed of Covenant. The Restructuring agreement between the parties contemplates that the holding of Grasim and the Second Defendant constituted 15.73% of the equity capital of L&T. The Restructuring agreement defines L&T shares to mean such number of fully paid equity shares representing 14.95% of the paid up equity capital of L&T held by Grasim and the Second Defendant. The sale price of Rs.240/- per share is defined as the price at which each of the L&T shares shall be sold to the Trust by Grasim and the Second Defendant in terms of the agreement and the Scheme of

Arrangement. The agreement defines its objectives as the demerger of the Cement Division of L&T, the purchase of shares of the Cement Company by Grasim, the acquisition of management control in the Cement Company by Grasim and the sale by Grasim to the Second Plaintiff "of the L&T shares so as to exit from the remaining business". In other words, the exit of Grasim from L&T was contemplated under the Restructuring Agreement by the sale of the L&T shares representing 14.95% of the holding in L&T. Under Clause 5 of the Restructuring agreement, L&T and Grasim agreed to enter into a Deed of Covenant which would set up rights and obligations of L&T in relation to the residual shareholding in the share capital of CemCo and certain obligations of Grasim towards L&T. Clause 1.7 of the Restructuring agreement stipulates that the agreement contained the entire agreement between the parties superseding all previous understandings:

> "11.7 Entire Agreement
>
> This Agreement contains the entire agreement of the Parties hereto with respect to the transactions envisaged in this Agreement, cancelling or superseding all other proposals, negotiations, prior discussions, understandings, arrangements, preliminary agreements, memoranda or heads of agreements and terms sheets made prior to the

> date hereof whether oral or written, with respect to the transactions envisaged hereunder."

22. The sanction of the Learned Company Judge to the Scheme of Arrangement was expressly sought on the basis that under the Scheme, the Employees' Trust will acquire 14.95% of the shareholding of Grasim in L&T. The Learned Single Judge held that this would achieve the object of demerging the cement business. On the other hand, the exit of Grasim and the Second Defendant from L&T by the sale of their shareholding would preserve the ownership and management of L&T.

23. After the scheme was sanctioned, a Deed of Covenant was entered into between the parties under which the following undertakings were mutually offered by L&T and Grasim to each other:

> "2. UNDERTAKINGS BY L&T AND GRASIM
>
> In consideration of the Restructuring in accordance with the terms of the Restructuring Agreement and the Scheme of Arrangement, L&T hereby agrees and undertakes that it shall dispose of the Residual Shareholding in terms of Section 4 hereof, and perform its other obligations as set out in Section 5 hereof in consideration of which Grasim agrees and undertakes to perform its obligations as set out

> in Section 7 of this Deed under and in accordance with this Deed."

L&T's obligations were defined in Clause 5 of the Deed of Covenant, while Grasim's obligations were defined in Clause 7. Under Clause 7.1(c), there is a clear distinction between Grasim's shareholding in L&T and L&T's shares. Finally, it would be necessary to refer to clause 12.4 of the Covenant under which it was provided as follows :

> "12.4 Entire Agreement
>
> This Deed contains the entire agreement of the Parties hereto with respect to the transactions envisaged in this Deed, cancelling or superseding all other proposals, negotiations, prior discussions, understandings, preliminary agreements, memoranda or heads of agreements and terms sheets made prior to the date hereof whether oral or written, with respect to the transactions envisaged hereunder."

24. Prima facie, the course of events that has taken place would show that it was initially within the contemplation of the parties that as part of the restructuring agreement of the cement business, Grasim would acquire a certain specified percentage of the equity of the Cement Company, while on the other hand, it would sell the entire

shareholding of 15.73% held by it together with the Second Defendant in L&T. What is important to note is that the restructuring was to be achieved through a restructuring agreement which would "set out the framework of the entire transaction, the manner of implementation and the respective rights and obligations of the parties". The Restructuring Agreement was therefore, to be the agreement embodying the entire transaction and defining parties' rights, obligations and entitlements. The proposal of Grasim was to the effect that parties would enter into a binding restructuring agreement which in turn, would be implemented by the Scheme of Arrangement, the Share sale and purchase agreement and a Deed of Covenant. L&T's Board discussed the proposal on 17th June 2003 and decided to accept the revised integrated proposal dated 15th June 2003 received from Grasim as amended and agreed to, between the parties, subject to final discussion, documentation and modification. In terms of their understandings, parties entered into a Restructuring agreement which contemplated the sale of 14.95% of the equity capital held by Grasim and the Second Defendant in L&T. Parties accepted, both in the Restructuring agreement and in the Deed of

Covenant, that these agreements constitute the entire record of the transaction superseding all prior discussions, negotiations and understandings.

25. The earlier understanding between the parties was that 15.73% of the shareholding of Grasim and the Second Defendant in L&T would have to be transferred. Parties were, however, conscious of the circumstance that the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 imposed a restriction on an acquirer acquiring shares or voting rights which taken together with voting rights held by him or by a person acting in concert with him entitle the acquirer to exercise 15% or more of the voting rights in the target Company unless a public announcement to acquire the shares is made by the acquirer in accordance with the Regulations. It was as a result of the SEBI Regulations that the letter dated 27th August 2003, addressed by D.D. Rathi on behalf of Grasim to the CMD of the L&T, was placed “in the safe custody” of S.Gurumurthy. The letter contemplated that if the Foundation obtained an exemption from SEBI, it would proceed to buy the entire quantum of 15.73% from

Grasim but, that in the meantime, in order to proceed with the transaction, it was agreed that Grasim would sell a stake under 15% to the foundation. However, if the foundation was not able to secure an exemption from SEBI, Grasim would offer all its stake to such parties as L&T may nominate, the latter ensuring that such parties were not deemed to be acting in concert. An application was made to SEBI upon which SEBI directed that the Second Plaintiff may approach SEBI after the demerger was complete. It was after SEBI's letter dated 21st October 2003 that the sanction of the Company Judge was taken to the Scheme of Arrangement expressly on the foundation that 14.95% of the holding of Grasim and the Second Defendant was being transferred to the Second Plaintiff. Neither before the shareholders when meetings were held, nor before the Company Judge, was there any reference to the existence of any other agreement between the parties which would have the effect of modifying the basis of the Scheme of Arrangement to which the sanction of the Company Judge was sought. It was after the transfer of 14.95% of the holding had taken place on 6th July 2004, that an application was made to SEBI by the Foundation for its permission in

respect of the balance of the 0.77% of shares. The percentage of equity shares proposed to be acquired was stated to be 0.77% and it was stated that on the acquisition of those shares, the total holding of the foundation L&T would be 15.72%.

26. Prima facie, there is in my opinion, merit in the submission that the earlier understanding between the parties for the sale of 15.73% of the equity capital held by Grasim in L&T, to the L&T Employees' Foundation was superseded by (i) The Restructuring agreement; (ii) The Scheme of Arrangement; and (iii) The Deed of Covenant. The Restructuring agreement was the foundation of the Scheme of Arrangement which was presented before this Court. The parties envisaged in the Restructuring agreement that the Second Plaintiff would acquire from the Defendants 14.95% of the holding of the Defendants in L&T. The Scheme of Arrangement which was presented to and sanctioned by the Company Court was expressly on that basis. This was followed by the Deed of Covenant which incorporated the same understanding. The Restructuring agreement and the Deed of Covenant stipulate that they would constitute the

whole understanding between the parties and would supersede all prior negotiations and understandings. The essential requirement of a novatio under Section 62 of the Contract Act is that there must be a complete substitution of a new contract in place of the old which would have the effect of rescinding, altering or extinguishing the previous contract. **Lata Construction vs. Dr.Rameshchandra Ramniklal Shah**, AIR 2000 SC 380 (at paragraph 1, page 383); **Vishram Arjun v. Irukulla Shankariah**, AIR 1957 A.P. 784 (at paragraphs 6 and 10); **Union of India vs. Kishorilal Gupta,** AIR 1959 SC 1362 (at paragraphs 5 and 6); **Citi Bank N.A. v. Standard Chartered Bank,** (2004) 1 SCC 12 (at paragraphs 47 and 50). In the present case, the terms of the Restructuring Agreement provide that the parties intended that it would constitute the entire agreement between them, cancelling and superseding all prior agreements and understandings.

27. It is in this background that a brief reference to the case which is pleaded by the Plaintiffs would be in order. In paragraph 14 of the plaint, the case of the Plaintiffs is that it was decided that the

process of exit of the Defendants from L&T would be divided into two stages, the first involving the sale of 14.95% of the shareholding and the balance being 0.78% of the shares which would have to be sold independently of the Scheme of Arrangement, after the Scheme of Arrangement finally became effective. Prima facie, at this stage, the Restructuring agreement and Deed of Covenant solemnly entered into between parties would preclude the existence of any such agreement independent of the Scheme of Arrangement. Paragraph 15 of the Plaint adverts to a meeting of the Board of Directors of L&T of 24th September 2003 and the averment is that the arrangement which was recorded and placed before the Board contemplated the sale of the entire shareholding of the Defendants in L&T and the complete exit of the Defendants by the sale of the entire shareholding at an agreed price of Rs.120/- per share. This part of the case prima facie is contrary to the record of the Minutes dated 24th September 2003. On 24th September 2003, the Board of L&T was apprised that 14.95% of the shareholding of Grasim would be sold to the Second Plaintiff while the balance would be sold in the open market. Prima facie, therefore, as on 24th September 2003, L&T's Board was

apprised of the fact that Grasim was under an obligation to sell 14.95% of its holding to the Second Plaintiff, while the balance would be sold in the open market. The sale in the open market was intended to be a part of the obligation of Grasim to exit from L&T. Grasim, it may be noted, has stated before this Court through its Counsel that it continues to be ready and willing to abide by that understanding to exit from L&T by the sale of its balance holding in the market at the price prevalent at the present time. But that apart, the Minutes of L&T's Board Meeting of 24th September 2003 detract from the Plaintiffs' case that independent of the Restructuring Agreement , Grasim's holding of the balance 0.78% was to be sold at a price of Rs.240/- per share. If at all, L&T's Board was apprised that the balance would be sold in the open market.

28. For all these reasons, I am unable to accede to the submission of the Plaintiffs that independent of the restructuring agreement, the Defendants were bound and obliged to sell 0.78% of their equity holding to the Plaintiffs at and for a consideration of Rs.240/- per share. At the time when the restructuring agreement

was entered into, parties confined the sale of the Defendants' holding to the extent of 14.95%, conscious as they were of the effect of the SEBI Regulations on the acquisition of shares or voting rights in excess of 15% in the target Company without making a public offer. There was, as noted earlier, an earlier understanding. Once however, the restructuring agreement was entered into that must, prima facie, be regarded as embodying the final, complete and enforceable understanding, particularly in the context of the fact that the sanction of the Court was sought and obtained on the basis of the restructuring agreement and that agreement alone.

29. The Second Plaintiff thereafter, applied for and obtained the permission of SEBI for the acquisition of an additional 0.77% of equity that would take the total holding of the Second Plaintiff to 15.72%. The Chairman and Managing Director of the First Defendant recorded his commitment for the balance shares “as soon as the issues are resolved”. The case of the Plaintiffs is that at a meeting held on 18th November 2004, parties agreed that the balance of the shares would be sold at a consideration of Rs.240/- per share and

that there was a commitment by the First Defendant to that effect. There is, however, a serious dispute on the correctness of the recording contained in the file note dated 19th November 2004. In the reply filed by Shri Rathi to the Notice of Motion, it has been stated that the internal file note of the Plaintiffs was e-mailed by Shri Sivaraman on behalf of the First Plaintiff to him. He has stated in his affidavit that he immediately called up Mr.Sivaraman and “asked him the intent and purport of sending such a false file”. Shri Rathi has stated that at that stage, Shri Sivaraman assured him that the note was an internal note of the Plaintiffs and was not intended to invite any comments/confirmation from him or the First Defendant. In the rejoinder filed on behalf of the Plaintiffs by Shri Sivaraman, it has not been disputed that Shri Rathi had called him up to express his displeasure at the recording of the discussion during the meeting upon which Shri Rathi commented, that this was only an internal note for the concerned officials. There is a serious dispute on the contents of the discussion between the officers of the two companies on 18th November 2004. That would require evidence to be adduced at the trial of the suit. At this stage, it cannot, prima facie, be concluded

that there was an agreement for the sale of the balance shares at a consideration of Rs.240/- per share. Meetings were held and as Counsel appearing for the Plaintiffs has submitted, drafts were exchanged. The exchange of drafts between Advocates cannot, at the interlocutory stage, be regarded as prima facie having resulted in a binding agreement. Whether the demand for an indemnity by Grasim would be suggestive of an agreement on a price of Rs.240/- for the balance shares, is a matter on which evidence would have to be adduced at the trial of the suit. At this stage, it cannot be concluded that there was any such binding agreement.

30. On the question of limitation, no opinion need be expressed at this stage. An issue shall have to be framed thereon and a finding rendered at the trial of the suit.

31. Finally, it would be appropriate to advert to the provisions of Section 10 of the Specific Relief Act, 1963. Section 10 postulates that specific performance of a contract may in the discretion of the Court be enforced where there exists no standard for asserting the actual

damage caused by the non-performance of the act agreed to be done or where compensation in money would not afford adequate relief. Explanation (ii) to Section 10 provides that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer movable property can be relieved by providing monetary compensation except where the property is not an ordinary article of commerce, or is of special value or interest to the Plaintiff or consists of goods which are not easily obtainable in the market. In the judgment of the Federal Court in **Jainarain vs. Surajmull**,[1] the Federal Court held that in a case where the subject matter of the contract consisted of certain shares in a Private Limited Company, that it was quite proper to grant a decree for specific performance of a contract for the sale of such shares and that would fall within the scope of the illustration where the shares were limited in number and were not ordinarily available in the market. The same view was taken in a judgment of the Privy Council in **The Bank of India Ltd. vs. Jamsetji A. H. Chinoy**.[2] More recently, the Supreme Court followed the dictum in **M. S. Madhusoodhanan v. Kerala Kaumudi Pvt. Ltd**.[3]

1 A. I. R. 1949 Federal Court 211
2 A. I. R. 1950 Privy Council 90
3 A. I. R. 2004 SC 909

(paragraph 139 at page 934). In the present case, it has been stated in the reply to the Notice of Motion that the shares of L&T are listed for trading on the Bombay Stock Exchange and the National Stock Exchange of India. It has been stated that on an average about 13 lakh shares of the scrip are being traded every day representing approximately 0.46% of the current total paid up capital of L&T and 0.52% of the share capital as of 2003. The balance of the shares in the case which constitute 0.78% of the total paid up capital of L&T, it has been submitted, could be procured easily from the stock market. L&T is a Public Limited Co. Prima facie, the facts as revealed in the reply would show the existence of a large number of transactions in which the shares of L&T are traded daily on the two premier Stock Exchanges in Mumbai. That being the position, prima facie, at this stage, it cannot be said that the case would fall within any of the exceptions carved out in the explanation to Section 10 of the Specific Relief Act, 1963. The Plaintiffs have in fact, in the alternative, quantified their claim in damages.

32. For all these reasons, I am of the view that a prima facie

case has not been made out for the grant of relief in the Notice of Motion. The Notice of Motion shall accordingly stand dismissed.

33. Counsel appearing on behalf of the Plaintiffs has applied for the continuation of the ad-interim order dated 5th October 2007 in order to enable the Plaintiffs to espouse their remedies in appeal.

34. In view of the fact that the Court will be in recess between 21st December 2007 and 6th January 2008, it is in my view appropriate to extend the ad-interim order so as to enable the parties to seek their remedies in appeal.

35. The ad-interim order dated 5th October 2007 shall, in the circumstances, stand extended until 18th January 2008.

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